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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

Conservatorship of the Person and Estate of
JEAN R.

2d Civil No. B172770
(Super. Ct. No. PR020370)
(San Luis Obispo County)

KAREN K. et al.,

Petitioners and Respondents,

v.

JEAN R.,

Objector and Appellant;

JOHN F. SACHS,

Claimant and Respondent.

Jean R. appeals from orders authorizing the payment of attorney's fees in a Lanterman-Petris-Short (LPS) conservatorship case.¹ (Welf. & Inst. Code, § 5350 et seq.)² We affirm an order requiring Jean to pay the fees of an attorney appointed by the

¹ We refer to certain individuals by their first names, not out of any familiarity or disrespect, but to protect their privacy.

² All statutory references are to the Welfare and Institutions Code unless otherwise stated.

court to represent her in the proceedings, but we reverse a portion of an order awarding fees to an attorney representing a family member who assumed responsibility for prosecuting the LPS petition. A private individual is not authorized to prosecute an LPS petition, and the attorney's fees for this service should not exceed the amount that would have been charged to the estate if the public agency that was authorized to prosecute the petition had done so.

BACKGROUND

On October 23, 2002, the Public Guardian of San Luis Obispo County filed a petition to establish a permanent LPS conservatorship over Jean. It alleged that Jean was 77 years old, had been committed to the Senior Mental Health Unit at St. Francis Medical Center in Santa Barbara, was gravely disabled as a result of a mental disorder, and was unwilling to accept or incapable of accepting treatment voluntarily. The court appointed the public guardian as temporary conservator and the Office of the Public Defender as Jean's counsel. (§§ 5352, 5352.1.) The public guardian was represented by county counsel.

Respondent Karen K. is Jean's daughter, and on November 6, 2002, she filed a petition to become her mother's permanent LPS conservator. At a hearing held November 12, the court appointed Karen as temporary conservator in lieu of the public guardian. It also relieved the public defender as Jean's counsel after determining that Jean had sufficient assets to pay for an attorney. Respondent John Sachs, the deputy public defender who had been working on the case, was appointed to represent Jean as private counsel.

After Karen was appointed temporary conservator, she assumed primary responsibility for seeking a permanent conservatorship. She was represented by attorney Wm. Peter Terhune, who assisted her in fulfilling her duties as temporary conservator and in completing the investigation and legal research necessary for a trial on the permanent conservatorship petition.

On March 20, 2003, Sachs withdrew as Jean's counsel and was replaced by attorney Jean Matulis. The case was set for trial on May 19. On May 14, Karen dismissed the petition for permanent conservatorship.

Karen filed a First and Final Account and Report of Temporary LPS Conservator. Among other things, she requested that Jean be ordered to pay \$27,817.59 in fees that Karen had incurred for attorney Terhune's services (\$225 per hour attorney time, \$125 per hour paralegal time, \$60 per hour office assistant time). Attorney Sachs filed a petition for payment of \$17,262 in fees (82.2 hours at \$210 per hour) for services rendered while representing Jean. Attorney Matulis filed opposition to both requests on behalf of Jean. She requested approval of \$13,362 in attorney's fees (106.9 hours at \$125 per hour).

In opposing an award of attorney's fees to Sachs, Jean argued that the court had erred when it removed the public defender from the case without first holding a hearing to determine Jean's financial eligibility. She maintained that if she was required to pay Sachs' legal fees, the amount should be limited to the pro rata share of the public defender's budget for such services. Jean also disputed the reasonableness of Sachs' fees based upon the work he actually performed and the value of his services to the case. The court rejected these arguments, awarded Sachs the \$17,262 in fees that he requested, and ordered that those fees be paid through a judgment lien on Jean's home, which was valued at approximately \$419,000.

In her opposition to attorney Terhune's fees, Jean argued that a private individual such as Karen may not prosecute an LPS conservatorship and thus may not recover fees in excess of what the county would have charged for bringing the petition. Jean also argued that a private individual cannot serve as a temporary conservator; hence, the attorney's fees attributable to the temporary conservatorship (as opposed to the petition for permanent conservatorship) must be reduced to what the public guardian and county counsel would have charged. The court agreed with this second argument, and reduced the fees attributable to the temporary conservatorship by \$3,725. It rejected the argument that Karen was unauthorized to prosecute the LPS petition, and awarded the

full amount of fees requested for this service, an amount that appears to be in excess of \$20,000. These fees were also ordered to be paid through a lien on Jean's home.

The court approved the \$13,362 in fees submitted by attorney Matulis.

DISCUSSION

Award of Fees to Attorney Sachs

Jean contends the public defender should not have been relieved as her counsel on November 12, 2002, and that as a consequence, she should not be liable to pay Sachs' fees for representing her as private counsel. We disagree.

A person who is the subject of a conservatorship proceeding is entitled to representation by the public defender if that person is financially unable to employ counsel. (Gov. Code, § 27706, subd. (d).) The determination of the conservatee's financial ability ultimately resides with the court. (Gov. Code, § 27707.)

In this case, the court appointed the public defender to represent Jean when it appointed the public guardian as the temporary conservator. In doing so, it complied with section 5365, which requires the appointment of the public defender or other counsel within five days of the date an LPS conservatorship petition is filed. There is nothing in the record to indicate the court had any information about Jean's financial eligibility when it made the initial appointment order. By the time of the first hearing in the case (which was held approximately three weeks later), the court had been advised through counsel that Jean possessed sufficient assets to pay for a lawyer. Based on this information, and with no objection from Jean, the court relieved the public defender and appointed attorney Sachs as private counsel. The accounting subsequently filed by Karen as temporary conservator shows that Jean owned a home valued at \$419,000, along with other assets, and had a monthly income exceeding \$4,000.

Jean argues that under Penal Code section 987.8, subdivision (b), the court was required to hold a full evidentiary hearing on her ability to pay before relieving the public defender. The provision she cites affects only reimbursement, authorizing a hearing at the conclusion of a case to determine whether a defendant has the ability to pay

for a portion of the fees incurred by the public defender or other appointed counsel.³ Nothing in section 987.8 required the court to hold a hearing before relieving the public defender, especially when Jean failed to request such a hearing. In any event, the accounting filed by Karen shows that if a hearing had been held, the court would have found that Jean had the ability to pay a lawyer.

Jean suggests the court should have ordered the public defender's office to continue its representation of her and then held a hearing at the conclusion of the case to determine the amount of reimbursement required. The court could have proceeded in this fashion, but it was not required to do so. It will be a rare case in which a conservatee's ability to pay will be known within five days of the date an LPS petition is filed, yet the court must appoint counsel to represent the conservatee within this short time period. (§ 5365.) Of necessity, the court frequently will appoint the public defender until it can be determined whether the conservatee can pay for his or her own attorney. Were we to hold that the conservatee is thereby entitled to continuing representation by the public defender, we would effectively obligate the public defender's office to represent all LPS conservatees, whether or not they had the ability to pay counsel. We are unwilling to place this burden upon an agency which, apart from issues of reimbursement, must use its resources to represent the truly indigent.

Jean complains she was never explicitly advised that she had the right to an attorney of her choice or that she could be required to pay Sachs' fees. The only advisement in the record is a written citation served on Jean on October 29, 2002, which stated, "You have the right of legal counsel appointed for you by the Court if you are unable to retain one." Implicit in this admonition was the notion that Jean could retain her own lawyer and would be required to pay for counsel if she was able to do so, but we agree the court should have been more specific in its advisements. (See *Conservatorship of Rand* (1996) 49 Cal.App.4th 835, 839-841.) Penal Code section 987.8, subdivision (f)

³ Although it is contained in the Penal Code, section 987.8 is applicable to all proceedings in which a party is represented by the public defender or appointed counsel. (*Id.*, subd. (j).)

provides, "Prior to the furnishing of counsel or legal assistance by the court, the court shall give notice to the defendant that the court may, after a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost of counsel. The court shall also give notice that, if the court determines that the defendant has the present ability, the court shall order him or her to pay all or a part of the cost. The notice shall inform the defendant that the order shall have the same force and effect as a judgment in a civil action"

The court should have complied with Penal Code section 987.8, subdivision (f) when it appointed Sachs to represent Jean as private counsel, but the omission of a full advisement was not prejudicial. Jean has made no showing that she would have foregone representation if she had been more specifically advised of her obligation to pay, and there is no indication that at the time Sachs was appointed, she desired different counsel or could have retained a lawyer for a lesser fee.⁴ She was able to dispute the reasonableness of Sachs' fees in a full hearing before the court and cannot demonstrate that the fees incurred would have been less if she had been given the advisement under section 987.8, subdivision (f). Jean makes no claim in this appeal that she was in fact unable to pay Sachs' fees or that the fees were unreasonable. There was no miscarriage of justice requiring reversal of the fee award to Sachs. (*People v. Smith* (2000) 81 Cal.App.4th 630, 637-640.)

In a related argument, Jean contends that Sachs' fees should be limited to a pro rata share of the public defender's budget. She relies on *Conservatorship of Berry* (1989) 210 Cal.App.3d 706, 726-727, in which the court held that when the *public defender* billed the county for attorney's fees in a conservatorship case, it was limited to recovering the actual costs of its services rather than the reasonable amount of its fees. The *Berry* case has no application to the calculation of fees incurred by a private attorney representing a conservatee who has the ability to pay for counsel.

⁴ Successor counsel Jean Matulis charged a lower hourly fee as a consideration to Jean given the amount of legal expenses already incurred.

Fees for Prosecuting LPS Petition

Jean argues that the trial court erred in awarding fees to Karen's attorney for prosecuting the LPS petition, because as a private party, Karen had no authority to proceed. We agree that the fee award should not have exceeded the amount that would have been incurred if the county had continued to prosecute the petition.

Under the LPS provisions, each county must designate a conservatorship investigation agency. (§ 5351.) That agency shall petition the superior court to establish an LPS conservatorship when it determines that a person meets the necessary criteria. (§ 5352.) Section 5114 provides, "At any judicial proceeding under the provisions of [LPS], allegations that the person is a danger to others, or to himself, or gravely disabled as a result of mental disorder . . . shall be presented by the district attorney for the county, unless the board of supervisors, by ordinance or resolution, delegates such duty to the county counsel."

In *Kaplan v. Superior Court* (1989) 216 Cal.App.3d 1354, 1359, the court held that a private party (in that case, the husband of the conservatee) did not have the authority to maintain an LPS proceeding after the county declined to do so. Relying upon section 5114, it explained, "In order to protect the liberty and dignity of persons threatened with confinement in a mental health facility, the Legislature has determined that the safeguards attending Probate Code conservatorships are insufficient, and has required that such restraints may be imposed only after complying with LPS. A vital element of this protective framework is the vesting in a public official the duty to investigate the need for a conservatorship which may lead to commitment, and the discretion to file a petition in light of that investigation. [¶] To allow anyone who may initiate a Probate Code conservatorship to assume the role of 'prosecutor' in an LPS proceeding would run counter to these protections. The effect would be to eliminate a key element of a statutory structure designed to assure that abuses of the mental health system in the form of unwarranted commitments are avoided. Here, as in the case of a criminal defendant, it is appropriate that when the power of the state is invoked to deprive an individual of her freedom, the decision to commence judicial proceedings should be

left to a public officer. . . . [¶] [W]e conclude that only the county's designated conservatorship investigation officer may file and prosecute a petition to establish an LPS conservatorship." (*Id.* at p. 1360, citation omitted; see also *Conservatorship of Martha P.* (2004) 117 Cal.App.4th 857, 868.)

In this case, the public guardian was the agency charged with the investigation of LPS conservatorships. Represented by county counsel, it filed the initial LPS petition in Jean's case. But when Jean's daughter Karen was appointed as temporary conservator, the public guardian and county counsel essentially dropped out and allowed the case to proceed on a petition that Karen had filed asking to be named permanent conservator. While it would have been perfectly appropriate for Karen to be named conservator when a permanent conservatorship was established, section 5114 precluded her from prosecuting the LPS petition as a private individual.

Karen suggests that she was authorized to prosecute the LPS petition notwithstanding section 5114 because she was named temporary conservator and a private conservator is authorized to petition the court for reappointment. We disagree. Section 5361 allows a person who has been appointed the permanent conservator to petition for reappointment before the conservatorship terminates.⁵ It does not grant a private individual the authority to file and prosecute an original LPS petition.

During the hearing on attorney's fees, a representative of the county advised the court that while it might seek fee reimbursement for prosecuting an LPS petition when the conservatee had assets, there was no formal system in place for doing so and the typical fee for completing an LPS case would be about \$500. In prosecuting the LPS petition herself, Karen incurred attorney's fees far in excess of those that would have been charged by the county. While we have no reason to doubt that Karen was acting for the laudatory purpose of protecting her mother, Jean should not be required to pay the fees of a private attorney who had no authority to prosecute the LPS petition.

⁵ Absent a reappointment order, an LPS conservatorship automatically terminates one year after the appointment of the permanent conservator by the superior court. (§ 5361.)

Although the parties have not directed us to a specific statute that would allow the county to recover its fees for prosecuting an LPS petition, Jean tacitly acknowledges that her estate would have been liable for such fees. Karen and her attorney prosecuted the LPS petition in this case and should likewise receive reimbursement from Jean's estate, but in an amount no greater than Jean would have paid if the public entity responsible for prosecuting the LPS petition had done so. The case must be remanded for a new hearing on the amount of attorney fees that Karen is entitled to recover from Jean's estate for her prosecution of the LPS petition, in an amount not to exceed that which could have been recovered by the county for the same service.

DISPOSITION

The order awarding attorney's fees and costs to respondent Sachs is affirmed. The order awarding attorney's fees and costs to respondent Karen K. is reversed and the case is remanded for a new hearing on the appropriate amount of fees. As between appellant and respondent Sachs, the parties shall bear their own costs on appeal due to Sachs' failure to file a respondent's brief. As between appellant and respondent Karen K., costs are awarded to appellant. Respondent County of San Luis Obispo shall bear its own costs.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Donald G. Umhofer, Judge
Superior Court County of San Luis Obispo

Jean F. Matulis for Objector and Appellant Jean R.

William Peter Terhune for Petitioner and Respondent Karen K.

James B. Lindholm, Jr., County Counsel, Rita L. Neal, Deputy County
Counsel, for Petitioner and Respondent County of San Luis Obispo.

No appearance for Claimant and Respondent John F. Sachs.